Supreme Court, U.S.
FILED
MAR 4 1991
OFFICE OF THE CLERK

No. 90-1277

In The

Supreme Court of the United States

October Term, 1990

CHARLES R. CRAMER, JR., ET AL.,

Petitioners,

versus

ASSOCIATION LIFE INSURANCE COMPANY, INC.,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Louisiana

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

By Attorneys,

BREAZEALE, SACHSE & WILSON
CHRISTINE LIPSEY
La. Bar Roll No. 1182
23rd Floor, One American Place
Post Office Box 3197
Baton Rouge, LA 70821-3197
Telephone: (504) 387-4000

Attorney of Record for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

58 pp

SPECIAL NOTIFICATIONS

Pursuant to Sup. Ct. R. 29.1, counsel for respondent certifies that respondent is a fourth-tier company whose immediate parent company is Western States Life Insurance Company, whose parent company is The Mutual Group (U.S.) Inc., whose parent company is Mutual Life Assurance of Canada. Respondent has no subsidiaries.

TABLE OF CONTENTS

Page

Special Notifications i

Table of Authorities iii

Statement of the Case 1

Summary of the Argument 5

Argument 6

Conclusion 25

APPENDICES

Appendix A – La. R.S. 22:657 ..... A-1

Appendix B – Opinion of the Louisiana Supreme Court – *Cramer v. Association Life Ins. Co.*, 569 So. 2d 533 (La. 1990) B-1

TABLE OF AUTHORITIES

Page

CASES:

Anschultz v. Connecticut Gen. Life Ins. Co., 850 F.2d 1467 (11th Cir. 1988).....7, 12, 20

Brock v. Primedica, Inc., 904 F.2d 295 (5th Cir. 1990) 20

California v. Sierra Club, 451 U.S. 287, 101 S. Ct. 1775, 68 L. Ed. 2d 101 (1981)..... 23

Cramer v. Association Life Ins. Co., 569 So. 2d 533 (La. 1990) 5, 10, 11, 18, 24

FMC Corp. v. Holliday, 498 U.S. ___, 111 S. Ct. 403, 112 L. Ed. 2d 356 (1990).....17, 18

Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 107 S. Ct. 2211, 96 L.Ed. 2d 1 (1987).....23, 24

FTC v. National Casualty Co., 357 U.S. 560, 78 S. Ct. 1260, 2 L. Ed. 2d 1540 (1958)..... 14

Group Life & Health Ins. v. Royal Drug Co., 440 U.S. 205, 99 S. Ct. 1067, 59 L. Ed. 2d 261 (1979)....11, 13

Hahn v. Oregon Physicians Service, 689 F.2d 840 (9th Cir. 1983) 14

Hewlett-Packard Co. v. Barnes, 571 F.2d 502 (9th Cir. 1978), *cert. denied*, 439 U.S. 831, 99 S. Ct. 108, 58 L. Ed. 2d 125 (1978)..... 16

Ingersoll-Rand Co. v. McClendon, ___ U.S. ___, 111 S. Ct. 478, ___ L. Ed. 2d ___ (1990) 20

In re Life Ins. Co. of North America, 857 F.2d 1190 (8th Cir. 1988).....7, 20

Kanne v. Connecticut Gen. Life Ins. Co., 867 F.2d 489 (9th Cir. 1988), *cert. denied* ___ U.S. ___, 109 S.Ct. 3216, 106 L. Ed. 2d 566 (1989).....7, 20

TABLE OF AUTHORITIES – Continued

Page

Kelley v. Sears, Roebuck and Co., 882 F.2d 453 (10th Cir. 1989) 12, 20

Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 105 S. Ct. 3085, ___ L. Ed. 2d ___ (1985) 21, 23, 24

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 105 S.Ct. 2380, 85 L. Ed. 2d 728 (1985) 7, 9, 10, 14, 17, 18

Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 101 S. Ct. 1571, 67 L. Ed. 2d 750 (1981) 22

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987) ..... *passim*

Ramirez v. Inter-Continental Hotels, 890 F.2d 760 (5th Cir. 1989) 7, 12, 20

Robertson v. People of State of California, 328 U.S. 440, 66 S. Ct. 1160, 90 L. Ed. 1366 (1946) 14

Securities & Exch. Com'n v. National Securities, 393 U.S. 453, 89 S. Ct. 564, 21 L. Ed. 2d 668 (1969) 13, 14

Sommers Drug Stores v. Corrigan Enterprises, Inc., 793 F.2d. 1456, *cert. denied*, 479 U.S. 1034, 107 S. Ct. 884, 93 L.Ed. 2d 837 (1987) 22

Spirt v. Teachers Ins. & Annuity Ass'n, 691 F.2d 1054 (2d Cir. 1982) 16, 17

Touche Ross & Co. v. Redington, 442 U.S. 560, 99 S. Ct. 2479, 61 L. Ed. 2d 82 (1979) 22

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 100 S. Ct. 242, 62 L.Ed. 2d 146 (1979) 22

Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 102 S. Ct. 3002, 73 L. Ed. 2d 647 (1982) 9, 11

Women in City Govern. United v. City of New York, 515 F. Supp. 295 (S.D.N.Y. 1981) 17

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

15 U.S.C. § 1011 9

15 U.S.C. § 1012 ..... 6, 15, 16

29 U.S.C. § 1001 ..... 2, 17, 20

29 U.S.C. § 1002 16

29 U.S.C. § 1081 16

29 U.S.C. § 1101 16

29 U.S.C. § 1132 ..... 2, 4, 21

29 U.S.C. § 1144 ..... 4, 5, 6, 7, 8, 15, 16

Colo. Rev. Stat. § 10-3-1104 13

Fla. Stat. § 624.155 12

La. R.S. 22:2 10

La. R.S. 22:657 ..... *passim*

Texas Ins. Code § 16, art. 21.21 12

OTHER RESOURCE MATERIAL:

9 G. Couch, *Cyclopedia of Insurance Law* § 39.53 (2d Ed. 1985) 11

Sen. Conf. Rep. (1974) 20

Sup. Ct. R. 10 7

No. 90-1277

In The

Supreme Court of the United States

October Term, 1990

CHARLES R. CRAMER, JR., ET AL.

Petitioners,

versus

ASSOCIATION LIFE INSURANCE COMPANY, INC.

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Louisiana

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

In September, 1986, petitioners, Charles R. Cramer, Jr. and Neva Gage Cramer (Cramers), filed suit against respondent, Association Life Insurance Company Inc. (Association Life), claiming benefits due under a health insurance policy entered into between Charles R. Cramer, Jr.'s employer, Advertising by Computer, Inc., and respondent. The claim at issue concerns a request for payment for the care and treatment of the Cramers' daughter.

In addition to the petitioners' claim for benefits under the group medical policy, the Cramers alleged that Association Life was arbitrary and capricious in its failure to pay their claim, thereby entitling them to recover a penalty of 100% of the principal sued on and reasonable attorneys' fees, pursuant to La. R.S. 22:657 (see Appendix A). Association Life denied that it owed any obligation to the petitioners.

Respondent filed an amended and supplemental answer pleading that the petitioners did not have a cause of action for penalties and mandatory attorneys' fees under La. R.S. 22:657, alleging that such claims were preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U.S.C. § 1001, *et seq.*, and its civil enforcement remedies found at 29 U.S.C. § 1132. Respondent also amended its original answer to deny that the Cramers were entitled to a trial by jury, due to ERISA's preemption.

Association Life then filed an exception of no cause of action or, alternatively, motion for partial summary judgment asking the trial court to dismiss the Cramers' claim for penalties and mandatory attorneys' fees under La. R.S. 22:657 and to strike the Cramers' request for a jury trial. Contemporaneous with the filing of its exception/motion, Association Life filed a motion *in limine* requesting the trial court to issue an order denying petitioners' jury trial demand, because the case was preempted by ERISA and the federal common law interpreting ERISA, which precludes a trial by jury. Association Life also moved for an *in limine* order limiting the evidence admissible at trial to that evidence which was

before it at the time its final claims decision was rendered, as required by prevailing case law interpreting ERISA.

The Cramers filed a cross motion for partial summary judgment, opposing Association Life's exception of no cause of action/motion for partial summary judgment and requesting an order of the court stating that ERISA was inapplicable to the case at bar. The Cramers also opposed Association Life's motion *in limine*.

The trial court denied Association Life's exception/motion and granted the Cramers' cross motion for partial summary judgment, stating that ERISA was inapplicable to the case at bar. The court also denied Association Life's motion *in limine*.

Upon Association Life's application, the Louisiana Court of Appeal, First Circuit, issued a writ of certiorari to review the trial court's ruling on the following issues:

> 1) Does ERISA apply to the case at bar, thus requiring the application of ERISA's civil enforcement provisions contained in 29 U.S.C. § 1132 and thereby preempting and displacing the plaintiffs' state law claims for breach of contract and penalties and mandatory attorneys' fees under La. R.S. 22:657?
>
> 2) If ERISA does apply to the case at bar, are the plaintiffs precluded from having a jury trial?
>
> 3) If ERISA does apply to the case at bar, shouldn't the evidence at trial be limited to that before Association Life at the time of its final claims decision, thus precluding a *de novo* trial court review, and requiring application of an arbitrary and capricious standard of review to the claims decision made by Association Life?

The court of appeal held that the trial court erred in not finding that ERISA is applicable to the instant case. The court reached this conclusion, because the health insurance benefits provided to the Cramers were afforded under an employee welfare benefit plan within the contemplation of ERISA.

However, the court of appeal determined that ERISA's preemption provision, § 514(a), 29 U.S.C. § 1144(a), does not preclude application of La. R.S. 22:657, because § 657 is a law regulating insurance "saved" from preemption under ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A). The court of appeal also held that the Cramers were entitled to a jury trial on the issue of penalties and mandatory attorneys' fees under La. R.S. 22:657. Additionally, the court found that the Cramers were entitled to a *de novo* review of their claims and would not be limited to offering evidence that was before Association Life at the time it rendered its final claims decision.

Association Life applied for supervisory writs to the Louisiana Supreme Court alleging the court of appeal erred as follows:

1) In finding that ERISA, specifically § 502, 29 U.S.C. § 1132, did not preempt the plaintiffs' state law claim for penalties and mandatory attorneys' fees under La. R.S. 22:657; and

2) In finding that plaintiffs were entitled to a trial by jury of their claim under La. R.S. 22:657.

After granting Association Life's application, the Louisiana Supreme Court held that § 657, as applied to a

claim under an ERISA employee welfare benefit plan, is preempted by ERISA because it fails to meet the "regulation of insurance" elements of the McCarran-Ferguson Act test, and because it conflicts with ERISA's civil enforcement provisions. The court reversed the appellate court's denial of Association Life's motion for partial summary judgment and remanded the case to the trial court for further proceedings in accordance with the supreme court's ruling (see the Louisiana Supreme Court's decision, *Cramer v. Association Life Ins. Co.*, 569 So. 2d 533 (La. 1990), attached as Appendix B).

The Cramers now petition for a writ of certiorari claiming that the Louisiana Supreme Court improperly extended this Court's decision in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987) to apply to the facts of the instant case.

SUMMARY OF THE ARGUMENT

This Court's preemption analysis in *Pilot Life, supra,* applies to La. R.S. 22:657, precluding § 657 from being saved from preemption by ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A). Section 657 should be treated like the Mississippi law of bad faith preempted in *Pilot Life,* because it does not spread the policyholder risk and is not integral to the insurer-insured relationship, thus failing the first two elements of the McCarran-Ferguson Act test for "regulation of insurance."

Consistent with the decision in *Pilot Life,* the federal courts of appeal have uniformly held that statutory bad

faith claims do not satisfy the McCarran-Ferguson criteria for regulation of insurance.

Further, in light of the Court's interpretation of the phrase "regulation of insurance" and Congress' clear authority to enact federal legislation in the area of employee benefit plans when that legislation does not impact on the regulation of insurance, the preemption of § 657 does not run afoul of 15 U.S.C. § 1012(b) and 29 U.S.C. § 1144(d).

The second ground for ERISA preemption of § 657 is that it conflicts with ERISA's "carefully integrated" civil enforcement scheme. The Congressional history of ERISA makes clear that ERISA's enforcement scheme is intended to be exclusive and not subject to conflicting state remedies. Again, the federal courts have uniformly held that statutory bad faith remedies conflict with ERISA's civil enforcement provisions and are, therefore, preempted.

Finally, the preemption of § 657 promotes, rather than undermines, the goals of ERISA. The purpose of ERISA's enforcement scheme is designed to protect employees' interests in employee benefit plans. Should Congress determine that the scheme is insufficient, Congress has the ability to amend the act to remedy any perceived insufficiency.

ARGUMENT

I. The Louisiana Supreme Court's decision is consistent with the rulings of this Court and the federal appellate courts.

There are no important reasons for the granting of petitioners' request for writ of certiorari, because the

Louisiana Supreme Court's decision does not conflict with the decision of another state court of last resort or of a United States court of appeals. Further, the decision of the Louisiana Supreme Court is consistent with applicable decisions of this Court. Sup. Ct. R. 10.

The Louisiana Supreme Court held that La. R.S. 22:657 is preempted by ERISA because it is not a law that regulates insurance and because it conflicts with ERISA's civil enforcement provisions. In reaching its conclusion, the Louisiana Supreme Court looked to this Court's analysis in *Pilot Life, supra,* and *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985).

The court also observed that the vast majority of federal jurisprudence interpreting "bad faith" statutes similar to § 657 have found that they are preempted by ERISA, citing *Ramirez v. Inter-Continental Hotels,* 890 F.2d 760 (5th Cir. 1989); *Kanne v. Connecticut Gen. Life Ins. Co.,* 867 F.2d 489 (9th Cir. 1988), *cert. denied* ___ U.S. ___, 109 S. Ct. 3216, 106 L. Ed. 2d 566 (1989); *In re Life Ins. Co. of North America,* 857 F.2d 1190 (8th Cir. 1988); and *Anschultz v. Connecticut Gen. Life Ins. Co.,* 850 F.2d 1467 (11th Cir. 1988).

II. The *Pilot Life* McCarran-Ferguson Act "regulation of insurance" analysis of a state common law cause of action for purposes of ERISA preemption applies to La. R.S. 22:657 and compels the same conclusion reached in *Pilot Life.*

A. *Pilot Life* common sense/McCarran-Ferguson Act tests.

The source of ERISA's preemption is, of course, § 514(a), 29 U.S.C. § 1144(a), the "preemption clause." The

preemption clause provides that a state law will be superseded by ERISA if the state law relates to an employee benefit plan.

Even though a state law relates to an employee benefit plan, however, the "saving clause" exempts the state law from ERISA's application if it is a law which "regulates insurance." § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A). ERISA's "deemer" clause is found at § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B), which states that even though a state law regulates insurance, it will be preempted if the application of the state law would deem the employee benefit plan to be an insurer.

The application of the preemption analysis to insured plans occurred in *Pilot Life, supra*. The plaintiff-employee in *Pilot Life* brought Mississippi common law claims for breach of contract and bad faith against the insurer that issued his employer's group insurance policy. Pilot Life argued that the plaintiff's claims were preempted by ERISA.

This Court observed that there was no dispute that the plaintiff's claims "related to" an employee benefit plan, thus falling under ERISA's preemption clause. The Court's next inquiry was whether Mississippi's common law bad faith tort action was a law "regulating insurance" saved from preemption by the saving clause.

The Court determined that the common sense understanding of the phrase "regulates insurance" did not support the argument that Mississippi's law of bad faith fell under the saving clause. Because any breach of contract could give rise to punitive damages under Mississippi's bad faith law, the Court concluded the law was not

directed toward the insurance industry. *Pilot Life, supra,* 107 S. Ct., at 1554.

The Court then referred to an analysis that it conducted in *Metropolitan Life, supra,* in order to determine if Mississippi's law was a statute regulating insurance. In *Metropolitan Life,* the Court utilized case law interpreting the phrase "business of insurance" under the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*

Three factors have been developed to ascertain if a statute or practice relates to the "business of insurance" for purposes of the McCarran-Ferguson Act: 1) does the practice transfer or spread a policyholder's risk; 2) is the practice an "integral part of the policy relationship between the insurer and insured"; and 3) is the practice "limited to entities within the insurance industry." *Pilot Life, supra,* 107 S. Ct., at 1553-54, *quoting Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119, 129, 102 S. Ct. 3002, 3009, 73 L. Ed. 2d 647 (1982).

The Court found the Mississippi common law of bad faith did not transfer or spread a policyholder's risk. With respect to the second McCarran-Ferguson Act factor, the Court found any "connection to the insurer-insured relationship attenuated at best" and stated as follows:

> [T]he common law of bad faith does not define the terms of the relationship between the insurer and the insured; it declares only that, whatever terms have been agreed upon in the insurance contract, a breach of that contract may in certain circumstances allow the policyholder to obtain punitive damages.

107 S. Ct., at 1555.

The Court, again observing that the Mississippi law of bad faith was available in any breach of contract case, stated that the law was not directed to the insurance industry. *Id.*

B. Application of *Pilot Life* and *Metropolitan Life* analysis to La. R.S. 22:657.

Unlike Mississippi's common law of bad faith, La. R.S. 22:657 is found in the Louisiana Insurance Code, which was enacted to regulate the business of insurance. La. R.S. 22:2.[1] The fact that § 657 is in the Louisiana Insurance Code does not, however, automatically make it a statute that "regulates insurance" within the contemplation of ERISA's saving clause, the McCarran-Ferguson Act factors, and *Pilot Life*.

While the Louisiana Supreme Court did not rule on whether § 657 satisfies the common sense test for regulation of insurance, it is conceded that it does. Likewise, § 657 meets the third McCarran-Ferguson Act factor, as the Louisiana Supreme Court found. *Cramer, supra*, at 537.

Petitioners contend that the Louisiana Supreme Court erred in not finding that the first McCarran-Ferguson Act factor – transference of the policyholder risk – is satisfied by § 657. Petitioners argue that a risk is transferred "only in the event that a valid claim is paid promptly and in full." p. 9, petition for writ of certiorari.

---

[1] In pertinent part, § 22:2(A)(1) states: "Insurance is a business affected with the public interest and it is the purpose of this code to regulate that business in all its phases."

Petitioners' argument has no support in the law. This Court, in *Union Labor Life Ins. Co. v. Pireno, supra,* at 131, 102 S. Ct., at 3009, determined that a transfer of risk from the insured to the insurer occurs when the contract is entered. *See also,* 9 G. Couch, *Cyclopedia of Insurance Law* § 39.53 (2d ed. 1985). Inherent in insurance are risks, some of which involve losses which will be spread over all the risks, thereby reducing the insurer's possible liability. *Group Life & Health Ins. v. Royal Drug Co.,* 440 U.S. 205, 211, 99 S. Ct. 1067, 1073, 59 L. Ed. 2d 261 (1979).

The Louisiana Supreme Court properly rejected petitioners' argument that a claims handling statute does not spread the policyholder risk. The court below stated as follows in response to petitioners' argument:

> In a health insurance contract, the risk spread among policyholders is the risk that an insured will require medical care for a covered illness. The insurance contract does not seek to spread the risk that the insurer will improperly handle a settlement claim.

Cramer, supra, at 537.

The Louisiana Supreme Court found support for its conclusion in this Court's finding in *Pilot Life* that Mississippi's common law bad faith remedy did not spread the policyholder risk, observing that the fact that § 657 is a statutory remedy rather than a common law remedy is "a distinction without relevance to the issue of whether La. R.S. 22:657 acts to spread a policyholder's risk." *Id.,* at 538.

Petitioners also suggest that the Louisiana Supreme Court erred in determining that § 657 is not an integral part of the insurer-insured relationship, thus failing the

second McCarran-Ferguson criteria. The court found that § 657, as the Mississippi common law of bad faith in *Pilot Life*, is unrelated to the substantive relationship between insurer and insured and is "primarily aimed at the procedural aspect of processing and settling claims." *Id.*, at 537.

The court's finding is supported not only by this Court's decision in *Pilot Life* but also by the federal courts of appeal. Several federal appellate courts have found that bad faith statutes similar to § 657 do not satisfy the first and second McCarran-Ferguson factors. The Fifth Circuit, in *Ramirez v. Inter-Continental Hotels, supra,* applied the McCarran-Ferguson analysis to § 16, article 21.21 of the Texas Insurance Code. Section 16 offers a private right of action for damages and attorneys' fees to individuals injured by "unfair methods of competition and unfair and deceptive acts or practices in the business of insurance . . . ". The court found that the statute neither transferred the policyholder risk nor defined the terms of the insurer-insured relationship. *Ramirez, supra,* at 763.

The Eleventh Circuit addressed Fla. Stat. § 624.155 in *Anschultz v. Connecticut Gen. Life Ins. Co., supra.* The insurance code statute provides a private remedy to individuals injured by violations of the state insurance code. The Eleventh Circuit concluded that § 624.155 does not satisfy the first and second McCarran-Ferguson factors, because the statute merely affords the beneficiary remedies upon breach of an employee welfare benefit plan.

In *Kelley v. Sears, Roebuck and Co.*, 882 F.2d 453 (10th Cir. 1989), the court reviewed claims against Allstate

based on Colorado's common law of bad faith and on Colo. Rev. Stat. § 10-3-1104, which prohibits unfair practices in the insurance industry. While acknowledging that the bad faith statute is associated with the insurance industry, the court found that it did not spread the policyholder risk or control the substantive terms of the insurance contract.

Petitioners ignore the foregoing jurisprudence which holds that bad faith claims-handling statutes do not define the substantive terms of the insurer-insured relationship. Petitioners choose to rely instead on language in this Court's interpretation of the McCarran-Ferguson Act in *Securities & Exch. Com'n v. National Securities*, 393 U.S. 453, 460, 89 S. Ct. 564, 568, 21 L. Ed. 2d 668, (1969) that "reliability, interpretation, and enforcement" of an insurance policy are at the "core of the 'business of insurance'." Petitioners argue that La. R.S. 22:657, "which insures the reliability of a policy and helps insure its accurate interpretation and also enforces the prompt and fair payment of claims" must be integral to the insurer-insured relationship. p. 10, petition for writ of certiorari.

Petitioners overlook this Court's explanation of Congressional concern which prompted the passage of the McCarran-Ferguson Act, i.e., Congress' concern "with the relationship between insurance ratemaking and the antitrust laws, and with the power of the States to tax insurance companies." *National Securities, supra*, at 459, 89 S. Ct., at 568. *See also, Royal Drug, supra*, at 218, 99 S. Ct., at 1076.

Of particular significance is the Court's language in *National Securities* which distinguishes *insurance companies* from the *business of insurance* for purposes of application

of the McCarran-Ferguson Act and gives examples of areas subject to state insurance regulation:

> The statute did not purport to make the States supreme in regulating all the activities of insurance *companies*; its language refers not to the persons or companies who are subject to state regulation, but to laws "regulating the *business* of insurance." Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the "business of insurance" does the statute apply. Certainly the fixing of rates is part of this business; that is what *South-Eastern Underwriters* was all about. The selling and advertising of policies, FTC v. National Casualty Co., 357 U.S. 560, 78 S. Ct. 1260, 2 L. Ed. 2d 1540 (1958), and the licensing of companies and their agents, cf. Robertson v. People of State of California, 328 U.S. 440, 66 S. Ct. 1160, 90 L. Ed. 1366 (1946), are also within the scope of the statute. Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which Paul v. Virginia held was not "commerce."

National Securities, supra, at 459, 89 S. Ct., at 568. (emphasis in the original).[2]

Inasmuch as claims practices statutes such as § 657 have nothing to do with activities such as ratemaking, underwriting, selling and advertising of policies, or

---

[2] Other cases have found that core activities such as underwriting and risk-spreading functions fall within the McCarran-Ferguson Act exemption for business of insurance. *Hahn v. Oregon Physicians Service,* 689 F.2d 840, 843 (9th Cir. 1983). Of course, in *Metropolitan Life, supra,* this Court found that mandated benefit laws regulate the business of insurance.

licensing of insurance companies, they clearly are not statutes which "regulate insurance" within the meaning of the McCarran-Ferguson Act. Such statutes may be directed to, and have an effect on, insurance *companies* but are subject to federal preemption because they are not laws which regulate the business of insurance.

While § 657 may meet the common sense test for regulation of insurance and the third McCarran-Ferguson Act factor, it is inescapable that the first and second McCarran-Ferguson factors are not met. Thus, § 657 is not a law "regulating business" within the meaning of the McCarran-Ferguson Act. The Louisiana Supreme Court's determination that § 657 does not spread the policyholder risk and is unrelated to the substantive relationship between the insurer and insured is correct.

C. The effect of 15 U.S.C. § 1012(b) and 29 U.S.C. § 1144(d) on La. R.S. 22:657.

In section III of their petition for writ of certiorari (pp. 15-16), petitioners argue that the preemption of § 657 runs afoul of both 15 U.S.C. § 1012(b)[3] and 29 U.S.C. § 1144(d).[4] Petitioners claim that ERISA's preemption of

---

[3] 15 U.S.C. § 1012(b) states, in pertinent part: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance."

[4] 29 U.S.C. § 1144(d) states, in pertinent part: "Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . ".

§ 657 abrogates both § 1012(b) of the McCarran-Ferguson Act and § 1144(d) of ERISA.

For the reasons explained, *supra*, § 657 is not a law which regulates insurance within the meaning of § 1012(b). Further, with respect to ERISA, there are some cases that say that the issue of whether a particular state law regulates insurance need not be reached because ERISA is an act which specifically relates to the business of insurance. *Hewlett-Packard Co. v. Barnes*, 571 F.2d 502, 505 (9th Cir. 1978), *cert. denied*, 439 U.S. 831, 99 S. Ct. 108, 58 L. Ed. 2d 125 (1978) and *Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1065 (2d Cir. 1982). *See also*, 29 U.S.C. §§ 1002(17), 1081(a)(2), 1081(b), and 1101(b)(2).

This argument is bolstered by the fact that ERISA envisions that insurance will play a significant role in the implementation of employee benefit plans. In defining an employee welfare benefit plan, Congress states that it is a plan, fund, or program established by an employer or employee organization "for the purpose of providing for its participants or their beneficiaries, through the *purchase of insurance or otherwise*" . . . certain benefits. 29 U.S.C. § 1002(1) (emphasis added). It is inescapable that Congress was aware that insurance would be integral to some plans and that benefits provided through insurance would be subject to ERISA administration and enforcement.

Focusing on the reasons for the passage of the McCarran-Ferguson Act (assurance that the states' insurance industry would not be subject to federal trade regulation and antitrust legislation), the courts have found as follows:

> [T]he Act should not be applied indiscriminately to subsequent federal legislation, the overriding purpose of which is not the regulation of commerce but the protection of other important federal interests. . . .

Women in City Govern. United v. City of New York, 515 F. Supp. 295, 303 (S.D.N.Y. 1981). *See also, Spirt, supra*, at 1065.

It is apparent that the McCarran-Ferguson Act is not a limitation on Congress' power to enact laws which may "incidentally affect the business of insurance" when areas of national concern are involved. *Id.* Since the intent of ERISA is to protect the participants of employee benefit plans, this certainly would seem to be protection of an important federal interest. 29 U.S.C. § 1001(b).

D. *FMC Corp. v. Holliday* has no effect on the Louisiana Supreme Court's decision in this case.

Relying on this Court's recent decision in *FMC Corp. v. Holliday*, 498 U.S. ___, 111 S. Ct. 403, 112 L. Ed. 2d 356 (1990), petitioners claim that the Louisiana Supreme Court ignored the distinction between regulation of an ERISA plan and regulation of an insurer who sells policies to an ERISA plan. p. 14, petition for writ of certiorari.

FMC concerned ERISA's preemption of a Pennsylvania anti-subrogation law as applied to a self-funded plan. Citing *Pilot Life* and *Metropolitan Life*, the Court found that the law regulated insurance, because it is aimed at the insurance industry and "directly controls the terms of insurance contracts by invalidating any subrogation provisions that they contain." *FMC*, 111 S. Ct., at 403. The

law in question was found to be preempted even though it directly regulated insurance, because the deemer clause prevented the self-funded plan from being "deemed" to be an insurer.

One of the differences between *FMC* and the case at bar is that the Pennsylvania anti-subrogation law is not an enforcement law, as § 657, but is more akin to the mandated benefits law in *Metropolitan Life, supra*. Further, the deemer clause controlled in *FMC* because a self-insured plan was involved rather than an insured plan such as the plan herein.

FMC cannot be relied on for the proposition that insured plans escape the application of ERISA because state laws *regulating insurance* are saved from ERISA's preemption. As stated, *supra*, Congress expected that insurance would play a key role in implementing ERISA plans and that insured plans, as well as self-funded plans, would be subject to ERISA's controls and enforcement.

III. La. R.S. 22:657 conflicts with the civil enforcement provisions of ERISA.

In addition to conducting the McCarran-Ferguson analysis to determine if § 657 is saved from preemption, the Louisiana Supreme Court considered "the role of the saving clause in ERISA as a whole to determine if application of the state law in question would interfere with the goals sought to be achieved by ERISA." *Cramer, supra*, at 538. The court looked to this Court's decision in *Pilot Life* and was strongly influenced by the determination

that ERISA's civil enforcement scheme is exclusive, precluding state law remedies that Congress rejected when enacting ERISA:

> In sum, the detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. "The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Russell, supra,* at 146, 105 S. Ct., at 3093 (emphasis in original).

Pilot Life, 107 S. Ct., at 1556.

Pilot Life's interpretation of Congressional intent is supported by ERISA's legislative history, particularly as is found in a portion of the Senate Conference Report on ERISA describing administration and enforcement:

> It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to *preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans.* This principle is intended to apply in its broadest sense to all actions of State or local governments, or any

> instrumentality thereof, which have the force or effect of law.

Sen. Conf. Rep. (1974), p. 29933 (emphasis added).

Pilot Life's holding regarding the exclusivity of ERISA's civil enforcement provisions has uniformly been followed by the federal appellate courts that have considered the issue, specifically, the Fifth Circuit in *Brock v. Primedica, Inc.*, 904 F.2d 295, 297 (5th Cir. 1990) and *Ramirez, supra,* at 763; the Eighth Circuit in *In re Life Ins. Co., supra,* at 1194; the Eleventh Circuit in *Anschultz, supra,* at 1469; the Ninth Circuit in *Kanne, supra,* at 100; and the Tenth Circuit in *Kelley, supra,* at 456.

Additionally, this Court very recently reaffirmed its determination that ERISA's civil enforcement remedies are exclusive in *Ingersoll-Rand Co. v. McClendon,* ___ U.S. ___, 111 S. Ct. 478, 485-86, ___ L. Ed. 2d ___ (1990).

Congress made the policy determination that the administration and enforcement of ERISA should be uniform throughout the country. Surely, a Congressional consideration was the multi-state employer who could be subject to fifty sets of regulations and enforcement remedies with respect to ERISA plan benefits. Such an administrative nightmare could discourage employers from providing benefits to employees – a result at odds with ERISA's stated goal of protecting the "interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. § 1001(b).

Despite the overwhelming jurisprudential support concerning Congress' intent and the exclusivity of ERISA's civil enforcement remedies, petitioners argue that Congress, through the 1989 House Report of the

Committee on Education and Labor, is in favor of the courts developing federal common law remedies, even if such remedies are not specifically included in 29 U.S.C. § 1132. Apparently included in these common law remedies would be the award of extracontractual or punitive damages for failure to timely pay claims.

Petitioners' argument is not supported by Congress' stated intent prior to the enactment of ERISA. Further this Court in *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144, 105 S. Ct. 3085, 3091, ___ L. Ed. 2d ___(1985) discussed the issue of implied extracontractual damages with respect to ERISA § 409(a) and determined that this section did not provide express authority for an award of extracontractual damages to a beneficiary. It is acknowledged that the Court did not reach the issue of extracontractual damages under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) because the respondent in *Russell* disclaimed reliance on § 502(a)(3). *Id.*, at 139, 105 S. Ct., at 3088, n.5.[5]

However, the *Russell* rationale also applies to § 502(a)(3) and undermines petitioners' argument that the federal courts are encouraged, without Congressional action, to award extracontractual or punitive damages in response to a bad faith claim:

---

[5] § 502(a)(3) states, in pertinent part, as follows:

> A civil action may be brought . . . by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter of the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan. . . .

> We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA. As we stated in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19, 100 S. Ct. 242, 246, 62 L. Ed. 2d 146 (1979): "[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." See also *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571-574, 99 S. Ct. 2479, 2486-2488, 61 L. Ed. 2d 82 (1979). "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. at 97, 101 S. Ct., at 1583.
>
> In contrast to the repeatedly emphasized purpose to protect contractually defined benefits, there is a stark absence in the statute itself and in its legislative history of any reference to an intention to authorize the recovery of extracontractual damages.

Id., at 147, 105 S. Ct., at 3093, (1985) (footnotes omitted).

In *Sommers Drug Stores v. Corrigan Enterprises, Inc.*, 793 F.2d. 1456, 1464-65, *cert. denied*, 479 U.S. 1034, 107 S. Ct. 884, 93 L. Ed. 2d 837, and 479 U.S. 1089, 107 S. Ct. 1298, 94 L. Ed. 2d 154 (1987), the court concluded that § 502(a)(3) does not permit recovery of extracontractual or punitive damages because the phrase "equitable relief," as is used in the law of trusts, does not include punitive damages.

Thus, unless Congress acts to amend ERISA and provides for extracontractual damages, "[t]he federal judiciary will not engraft a remedy on a statute, no matter how

salutary, that Congress did not intend to provide." *Russell, supra,* at 145, 105 S. Ct., at 3092, *quoting California v. Sierra Club,* 451 U.S. 287, 297, 101 S. Ct. 1775, 1781, 68 L. Ed. 2d 101 (1981).

For the foregoing reasons, the Louisiana Supreme Court was correct in finding that La. R.S. 22:657 conflicts with ERISA's comprehensive enforcement scheme.

IV. Preemption of La. R.S. 22:657 furthers the goals of ERISA.

Petitioners suggest that this Court's decision in *Fort Halifax Packing Co., Inc. v. Coyne,* 482 U.S. 1, 107 S. Ct. 2211, 96 L. Ed. 2d 1 (1987) supports their argument that preemption of La. R.S. 22:657 does not further the purpose of ERISA preemption. In *Fort Halifax,* the Court held that a one-time severance payment to employees in the event of a plant closure was not preempted by ERISA because the benefit did not relate to an employee benefit plan. The Court observed that "[t]he theoretical possibility of a one-time obligation in the future simply creates no need for an ongoing administrative program for processing claims and paying benefits." *Id.,* 107 S. Ct., at 2218.

In an effort to distinguish between plans and plans which purchase insurance to implement a plan, petitioners cite language from *Fort Halifax* that "Congress pre-empted state laws relating to *plans,* rather than simply to *benefits.*" 107 S. Ct., at 2217 (emphasis in the original).

Petitioners ignore the fact that insured plans are, in fact, *plans* and not simply benefits. Insured plans involve an ongoing administrative program for processing claims and paying benefits unlike the one-time severance benefit in *Fort Halifax*. More important, unlike the situation in *Fort Halifax* where the statute was not an enforcement statute which conflicted with a federal statute, La. R.S. 22:657 *is* an enforcement statute which conflicts with a federal statute, ERISA § 502. *Id.* 107 S. Ct., at 2221. Moreover, § 657 differs from *Fort Halifax's* severance benefit because it is not an attempt "to address uniquely local, social, and economic problems." *Id.*

Petitioners also argue that preemption of claims-handling statutes will create a situation where insurers will engage in massive abuses and will undermine ERISA's express purpose of protecting beneficiaries. p. 13, petition for writ of certiorari.

The Louisiana Supreme Court's response to this argument was that ERISA's comprehensive civil enforcement scheme was "designed specifically to protect the interests of the employee." *Cramer, supra,* at 538. Included in the remedies provided for is the discretionary award of reasonable attorneys' fees, which addresses any "possible concern that attorney's fees might present a barrier to maintenance of suits for small claims, thereby risking underenforcement of beneficiaries' statutory rights . . . ". *Russell, supra,* at 149, 105 S. Ct., at 3093.

Rather than protecting employees, punitive damages could leave employees with no benefits at all. Congress certainly considered that exposure to punitive damages

could dissuade employers from providing employee benefits. If an insurer who funds a plan has exposure for double an underlying claim (as with § 657), it is inevitable that rates would have to be increased. Increased premiums could result in an employer reducing or eliminating coverage. Congress did not intend to design a scheme that is contrary to the interests of employees and their beneficiaries.

CONCLUSION

The Louisiana Supreme Court's decision in this case is correct. La. R.S. 22:657 is properly preempted by ERISA because it is not a law that regulates insurance and because it conflicts with ERISA's civil enforcement provisions. The Louisiana Supreme Court's finding is consistent with applicable decisions of this Court and the United States courts of appeals. Therefore, petitioners' petition for writ of certiorari should be denied.

By Attorneys:

BREAZEALE, SACHSE & WILSON
23rd Floor, One American Place
P.O. Box 3197
Baton Rouge, LA 70821-3197
Telephone: (504) 387-4000

CHRISTINE LIPSEY
Louisiana Bar Roll No. 1182

Attorney of Record for Respondent, Association Life Insurance Company Inc.

APPENDICES

APPENDIX A

§ 657. Payment of claims; health and accident policies; prospective review; penalties; self-insurers

A. All claims arising under the terms of health and accident contracts issued in this state, except as provided in Subsection B, shall be paid not more than thirty days from the date upon which written notice and proof of claim, in the form required by the terms of the policy, are furnished to the insurer unless just and reasonable grounds, such as would put a reasonable and prudent businessman on his guard, exist. The insurer shall make payment at least every thirty days to the assured during that part of the period of his disability covered by the policy or contract of insurance during which the insured in entitled to such payments. Failure to comply with the provisions of this Section shall subject the insurer to a penalty payable to the insured of double the amount of the health and accidents benefits due under the terms of the policy or contract during the period of delay, together with attorney's fees to be determined by the court. Any court of competent jurisdiction in the parish where the insured lives or has his domicile, excepting a justice of the peace court, shall have jurisdiction to try such cases.

Amended by Acts 1990, No. 872, § 1, eff. July 25, 1990.

APPENDIX B

Charles R. CRAMER, Jr. and Neva Gage Cramer

v.

ASSOCIATION LIFE INSURANCE COMPANY.

No. 90-CC-0804.

Supreme Court of Louisiana.

Nov. 8, 1990.

Employee brought action against insurer under employer's health plan for failure to pay benefits. The Nineteenth Judicial District Court, East Baton Rouge Parish, Joseph F. Keogh, J., held for employee on issue of applicable law, and certiorari review was sought. The Court of Appeal, 563 So.2d 267, denied writ in part and made writ preemptory in part. Supervisory writs were applied for. The Supreme Court, Cole, J., held that state statute providing penalty for late payment of health and accident benefits and mandating award of attorney's fees for collection of benefits, was preempted by ERISA.

Reversed and remanded.

Calogero, C.J., dissented and assigned reasons.

Lemmon, J., dissents and will assign reasons.

Christine Lipsey, Breazeale, Sachse & Wilson, Baton Rouge, for Association Life Ins. Co., Inc., defendant-applicant.

Allen M. Posey, Jr., Baton Rouge, for Charles Cramer and Neva Cramer, plaintiff-respondent.

Richard Tyler, amicus curiae.

David Radlauer, amicus curiae.

Woodrow E. Eno, amicus curiae.

W. Shelby McKenzie, amicus curiae.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT

COLE, Justice.

FACTS

On September 24, 1986, plaintiffs, Charles and Neva Cramer, Jr., filed suit against defendant, Association Life Insurance Company, Inc. (ALIC), claiming benefits due under a health insurance policy purchased by Mr. Cramer's employer, Advertising By Computer, Inc. (ABC). Plaintiffs also sought penalties and reasonable attorney's fees pursuant to La.R.S. 22:657 because of defendant's alleged arbitrary and capricious failure to pay their claim. Defendant, in its original answer, denied any obligation to plaintiffs. In an amended and supplemental answer, defendant asserted plaintiffs do not have a cause of action for penalties and mandatory attorney's fees under La.R.S. 22:657 because such claims are preempted by the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C.A. § 1001, *et seq.* (ERISA).

On December 15, 1988, defendant filed the peremptory exception raising the objection of no cause of action, and, alternatively, a motion for partial summary judgment, claiming plaintiffs' claim for statutory penalties and attorney's fees under R.S. 22-657 was preempted by ERISA. At the same time, defendant filed a motion *in*

limine requesting the trial court to deny plaintiffs' demand for a jury trial because the case is governed by ERISA and the federal common law interpreting ERISA precludes a trial by jury. Plaintiffs filed a cross motion for partial summary judgment, opposing defendant's exception and motion for summary judgment, and requested an order of the court declaring ERISA inapplicable to the instant case.

The trial court ruled that ERISA was inapplicable to the instant case, denied defendant's exception, denied defendant's motion for partial summary judgment and its motion *in-limine* to preclude a jury trial, and granted plaintiffs' motion for summary judgment. Defendant then applied for supervisory writs to the Court of Appeal, First Circuit. The Court of Appeal issued a writ of certiorari to review the trial court's ruling on the following issues:

> 1) whether ERISA applies to the case at bar, thus requiring the application of ERISA's civil enforcement provisions and thereby preempting plaintiffs' claim for penalties and mandatory attorney's fees under La.R.S. 22:657;
>
> 2) if ERISA applies, are plaintiffs precluded from having a jury trial;
>
> 3) if ERISA applies, should the evidence at trial be limited to that before defendant at the time of its final claims decision, thus precluding a *de novo* trial court review and requiring application of an arbitrary and capricious standard of review to the claims decision made by defendant?

After reviewing the case, the Court of Appeal ruled 1) ERISA applies to the case at bar because an "employee

benefit plan," as the term is defined in ERISA, existed at the time the plaintiffs' claims arose; 2) plaintiffs' claim for penalties and mandatory attorney's fees is not preempted by ERISA; 3) plaintiffs are entitled to a jury trial of those issues pertaining to benefits under the Louisiana Insurance Code, but are not entitled to a jury trial of any issue governed by ERISA; and 4) the evidence at trial should not be limited to that before the defendant at the time of its final claims decision, and the arbitrary and capricious standard is not applicable in the instant case.

Defendant applied to this Court for supervisory writs to challenge the rulings of the Court of Appeal. Specifically, defendant challenges 1) the Court of Appeal's ruling that ERISA does not preempt plaintiffs' state law claim for penalties and mandatory attorney's fees under La.R.S. 22:657; and 2) the Court of Appeal's ruling that plaintiffs are entitled to a jury trial of the claim under R.S. 22:657. Plaintiffs, in their response to defendant's arguments, do not challenge the Court of Appeal's ruling that ERISA applies to the instant case. Therefore, the primary issue before this Court is whether ERISA preempts La.R.S. 22:657. If La.R.S. 22:657 is preempted by ERISA, then plaintiffs have no cause of action for penalties and mandatory attorney's fees, and are not entitled to a jury trial.

I.

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, et seq., is a comprehensive set of regulations governing employee pension and welfare plans. An employee welfare-benefit plan is defined in ERISA as one which provides to employees "medical,

surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability [or] death," whether these benefits are provided "through the purchase of insurance or otherwise." ERISA imposes upon pension plans a variety of substantive requirements relating to participation, funding, and vesting. 29 U.S.C. §§ 1051-1086. Additionally, ERISA establishes various uniform procedural standards concerning reporting, disclosure, and fiduciary responsibility for both pension and welfare plans.

To effectuate the substantive and procedural provisions of ERISA, Congress created within the Act an extensive civil enforcement scheme. 29 U.S.C. § 1132. Under the civil enforcement provisions of ERISA, a plan participant or beneficiary may sue to recover benefits due under the plan, to enforce the participant's rights under the plan, or to clarify rights to future benefits. Relief may take the form of accrued benefits due, a declaratory judgment on entitlement to benefits, or an injunction against a plan administrator's improper refusal to pay benefits. Additionally, in an action under the civil enforcement provisions, the court in its discretion may allow an award of attorney's fees. *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987). However, the civil enforcement provisions do not allow exemplary damages. *Sommers Drug Stores Co. Employees Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1464 (5th Cir. 1986), *cert. denied* 479 U.S. 1034, 107 S.Ct. 884, 93 L.Ed.2d 837, and 479 U.S. 1089, 107 S.Ct. 1298, 94 L.Ed.2d 154 (1987).

Recognizing that the broad provisions of ERISA overlap with numerous state regulatory laws, Congress put in

ERISA three provisions relating to the preemptive effect of the federal legislation, often referred to as the pre-emption clause, the savings clause, and the deemer clause. The pre-emption clause[1] states:

> Except as provided in subsection (b) of this section [the savings clause], the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan . . . (*Emphasis added.*)

The savings clause[2] states:

> Except as provided in subparagraph (B) [the deemer clause], nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which *regulates insurance,* banking, or securities. (*Emphasis added.*)

The deemer clause[3] states:

> Neither an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer . . . or to be engaged in the *business of insurance* . . . for purposes of any law of any State purporting to regulate insurance companies [or] insurance contracts . . . (*Emphasis added.*)

As noted by the United States Supreme Court, the three pre-emption sections of ERISA are not a model of legislative drafting. *Metropolitan Life Insurance Co. v. Massachusetts,* 471 U.S. 724, 105 S.Ct. 2380, 85 L.Ed.2d 728

---

[1] 29 U.S.C. § 1144(a).

[2] 29 U.S.C. § 1144(b)(2)(A).

[3] 29 U.S.C. § 1144((b)(2)(B).

(1985).[4] However, the sections generally can be said to work as follows: if a state law relates to employee benefit plans it is preempted unless the law "regulates insurance," in which case the savings clause saves the law from pre-emption; but, a state law that purports to regulate insurance may not deem an employee benefit plan to be an insurance company.

In this case, plaintiffs seek punitive damages and attorney's fees for defendant's alleged arbitrary and capricious failure to pay medical benefits under an employee welfare benefit plan. Plaintiffs rely on La.R.S. 22:657 for the recovery of such damages. R.S. 22:657 provides, in pertinent part:

> All claims arising under the terms of health and accident contracts issued in this state . . . shall be paid not more than thirty days from the date upon which written notice and proof of claim . . . are furnished to the insurer unless just and reasonable grounds . . . exist. Failure to comply with the provisions of this Section shall subject the insurer to a penalty payable to the insured of double the amount of the health and accident benefits due under the terms of the policy or contract during the period of delay, together with attorney's fees to be determined by the court.

---

[4] The court noted that the apparent clarity of the preemption sections on their faces is deceiving. The court stated, " . . . while the general preemption clause broadly preempts state law, the saving clause appears broadly to preserve the State's lawmaking power over much of the same regulation. While Congress occasionally decides to return to the States what it has previously taken away, it does not normally do both at the same time." 105 S.Ct. at 2389.

The above-cited portion of § 657 provides for mandatory attorney's fees and penalties in cases where an insurance company arbitrarily fails to pay benefits. As noted above, however, the ERISA civil enforcement provisions do not allow punitive damages for the arbitrary failure to pay employee welfare benefits, and attorney's fees in such actions are discretionary not mandatory. Thus, a concern in resolving the issue in the present case is whether La.R.S. 22:657 is a law which "regulates insurance" within the meaning of the savings clause such that the provision is not preempted by ERISA.

In interpreting the pre-emption clauses of ERISA, we have the benefit of two United States Supreme Court cases which clarify their scope and meaning. In *Pilot Life Insurance Co. v. Dedeaux,* supra, the Court held to be preempted by ERISA state common law tort and breach of contract actions asserting improper processing of a claim for benefits under an employee benefit plan. In *Metropolitan Life Insurance Co. v. Massachusetts,* supra, the court found a Massachusetts minimum health-care benefits law not to be preempted by ERISA. A careful reading of these two cases reveals the proper analysis to be used in determining whether a specific state law is preempted by ERISA. A careful reading of these two cases reveals the proper analysis to be used in determining whether a specific state law is preempted by ERISA.

First, we must determine if the state law at issue "relates to" an employee benefit plan such that it is within ERISA's preemption clause. In *Pilot Life,* the court noted that the phrase "relate[s] to" should be given its broad, common-sense interpretation. Thus, the court held, a state law "relates to" a benefit plan if it "has a

connection with or reference to such a plan." It is not necessary for the law to be specifically designed to affect employee benefit plans. 105 S.Ct. at 2389. The court applied the common-sense test to the cause of action raising improper handling of a claim for benefits under an employee benefit plan, and found the state law "undoubtedly meet[s] the criteria for pre-emption" under the pre-emption clause. 107 S.Ct. at 1553.

Applying the common-sense test to R.S. 22:657, it is clear the statute "relates to" an employee benefit plan. The basis for the plaintiff's suit is the defendant-insurer's alleged arbitrary and capricious failure to pay benefits under an employee benefit plan. R.S. 22:657 is specifically directed to an insurance company's handling of a claim under such an employee benefit plan.

Having found R.S. 22:657 "relates to" an employee benefit plan, we next determine if the statute "regulates insurance" and thus comes within the savings clause. To make this determination, we again turn to *Pilot Life*. In *Pilot Life*, the Supreme Court found Mississippi's common law of bad faith was preempted as it applied to a plaintiff's claim for the improper handling of an employee benefit plan. The Court first noted Mississippi's common law of bad faith was not specifically directed at insurance companies, but rather was a law of general application. Thus, the law did not fit the common sense meaning of the phrase "regulates insurance." However, the Court did not rest its holding solely on the common sense interpretation of the phrase. Instead, the Court sought guidance from federal jurisprudence interpreting the phrase "business of insurance" as used in the McCarran-

Ferguson Act,[5] and from the role of the saving clause within the entire structure of ERISA.

A.

Three criteria have been used to determine whether a particular practice falls under "the business of insurance" for purposes of the McCarran-Ferguson Act. First, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry. 107 S.Ct. at 1553. As applied to Mississippi's common law of bad faith, the court found that none of the factors was met. The common law of bad faith does not effect a spreading of policyholder risk. Further, although the common law of bad faith may be said to concern the policy relationship between the insured and the insurer, the connection to such relationship is tenuous. The law of bad faith does not define the substance of the relationship, but merely provides for a remedy when there has been a breach of the contract defining the relationship. Lastly, the court noted Mississippi's common law of bad faith is a law of general application not limited to entities in the insurance industry.

---

[5] The McCarran-Ferguson Act provides, in pertinent part: "[t]he business of insurance, and every person engaged therein, shall be subject of the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a).

Applying the McCarran-Ferguson criteria to the facts of this case reveals much of what the court in *Pilot Life* said about Mississippi's common law of bad faith applies to R.S. 22:657. Although § 657 is limited to insurance companies and thus meets the third factor of the McCarran-Ferguson test, factors one and two are not met. The statute is not an integral part of the insurer-insured relationship. The insurer-insured relationship is defined in the substantive provisions of the insurance contract, and consists of the respective obligations of each party to the contract. Just like the common law of bad faith found by the Supreme Court in *Pilot Life* not to be integral to the insurer-insured relationship, R.S. 22:657 merely provides a remedy, albeit statutory, for an insurance company's breach of a previously defined substantive relationship. Instead of regulating the substantive terms or content of insurance policies, R.S. 22:657 is primarily aimed at the procedural aspect of processing and settling claims.

Also, the statute does not effect a spreading of policyholder risk. As we appreciate the use of the term "spreading of risk" in the context of an insurance policy, the risk focused upon is that risk for which the insurance company has specifically contracted to reimburse its insured. In *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982), the Supreme Court interpreted the phrase "spreading of policyholder risk" in the context of the McCarran-Ferguson Act. The court stated, "[t]he transfer of risk from insured to insurer is effected by means of the contract between the parties – the insurance policy – and that transfer is complete at the time that the contract is entered." 458 U.S. at 130, 102 S.Ct. at 3009. The court went on to note, " . . . the

fundamental principle of insurance [is] that the insurance policy defines the scope of risk assumed by the insurer from the insured." 458 U.S. at 131, 102 S.Ct. at 3010. Thus, when looking to see if a particular practice acts to "spread the risk," we must focus upon the actual risks that were transferred from the insured to the insurer and determine if the practice acts to alter the contractual apportionment of those risks.

In this case, the Court of Appeal found, and plaintiffs argue, R.S. 22:657 meets the first factor of the McCarran-Ferguson factors because it acts to spread the risk that an insurer will improperly handle a settlement claim. However, the Court of Appeal's reasoning misconstrues the proper focus of the phrase "spreading a policyholder's risk." The employee benefit plan in question pertains to health insurance. In a health insurance contract, the risk spread among policyholders is the risk that an insured will require medical care for a covered illness. The insurance contract does not seek to spread the risk that the insurer will improperly handle a settlement claim. In fact, if the Court of Appeal's reasoning were correct, the Supreme Court in *Pilot Life* would have found the Mississippi law in question to be a practice which acts to spread a policyholder's risk when applied in the context of an employee benefit plan. To the contrary, however, the Supreme Court found Mississippi's law did not have such an effect, and this Court can discern no principled reason why the same conclusion is not warranted in this case. The mere fact that R.S. 22:657 is a statutory remedy while the law in *Pilot Life* was a common law remedy is a distinction without relevance to the issue of whether R.S. 22:657 acts to spread a policyholder's risk.

B.

Our finding that R.S. 22:657 fails to meet two of the three McCarran-Ferguson criteria does not necessarily end our analysis. As the Court in *Pilot Life* indicated, the McCarran-Ferguson test is not the sole consideration to be addressed in determining whether a particular state law is preempted by ERISA. A reviewing court should also consider the role of the saving clause in ERISA as a whole to determine if application of the state law in question would interfere with the goals sought to be achieved by ERISA. In *Pilot Life*, the court referred to the comprehensive civil enforcement scheme of ERISA, and noted it is one of the essential tools for accomplishing the stated purposes of the Act. The court went on to hold Congress clearly expressed an intent that the civil enforcement provisions of ERISA be the *exclusive* vehicle for actions by ERISA-plan participants and beneficiaries asserting improper processing of a claim for benefits. The court stated, "[t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." 107 S.Ct. at 1556.

In this case, plaintiffs, ERISA-plan participants, are seeking to use R.S. 22:657 as a vehicle to obtain relief for the alleged improper handling of their claim for benefits. As noted previously, R.S. 22:657 allows punitive damages to be recovered for an insurer's arbitrary refusal to pay benefits, and mandates the payment of attorney's fees. The civil enforcement scheme of ERISA does not allow punitive damages and attorney's fees are discretionary

not mandatory. *Pilot Life*, supra. Thus, there is a clear conflict between R.S. 22:657 and the substantive provisions of ERISA's civil enforcement scheme. Consequently, the clear language used by the Supreme Court in *Pilot Life* compels us to hold that R.S. 22:657, as applied to an ERISA plan, is preempted by the civil enforcement provisions of ERISA.

In finding R.S. 22:657 not to be preempted, the Court of Appeal stated, "[t]o hold otherwise would violate the most fundamental of all substantial policies of ERISA, viz. to protect the interest of the employee." *Cramer v. Association Life Ins. Co., Inc.*, 563 So.2d 267, 275 (La.App. 1st Cir. 1990). This statement overlooks the fact that Congress created a comprehensive civil enforcement scheme designed specifically to protect the interests of the employee. Under 29 U.S.C. § 1132, plaintiffs have a cause of action against defendant for the recovery of accrued benefits due, and may recover reasonable attorney's fees if the trial court determines the facts warrant such an award. Merely because Congress chose not to adopt the type of remedy available in R.S. 22:657 does not mean employees' interests are not being protected adequately. Indeed, as the court in *Pilot Life* noted, the civil enforcement provisions in ERISA represent a "careful balancing of the need for prompt and fair claims settlement procedures and the public interest in encouraging the formation of employee benefit plans." 107 S.Ct. at 1556. To disrupt Congress' carefully thought-out remedies by allowing plaintiffs to raise a claim under R.S. 22:657 would be to ignore the strong evidence that Congress intended ERISA's civil remedies to be exclusive.

Our holding in this case is supported by the vast majority of the federal jurisprudence interpreting statutes similar to R.S. 22:657. In *Ramirez v. Inter-Continental Hotels,* 890 F.2d 760 (5th Cir.1989), the court held that Texas Insurance Code article 21.21 § 16 was preempted by ERISA. The Texas statute furnishes a right of action and allows treble damages and attorneys' fees to persons injured by certain enumerated unfair methods of competition and unfair and deceptive acts or practices in the business of insurance. Plaintiff attempted to use the statute to recover punitive damages for the insurer's failure to pay benefits allegedly due plaintiff. Referring to the McCarran-Ferguson factors mentioned in *Pilot Life,* the court found the statute does not transfer or spread policyholder risk, and does not define the terms of the relationship between the insurer and the insured. Additionally, the court found the effect of the statute to be indistinguishable from the effect of the common law addressed in *Pilot Life.* The court stated, "[t]o interpret the savings clause as authorizing such inconsistent state remedies would be to defeat Congressional intent by destroying the exclusivity of ERISA's civil enforcement provisions." 890 F.2d at 763-64. *See also, Kanne v. Connecticut Gen. Life Ins. Co.,* 867 F.2d 489 (9th Cir.1988), *cert. denied,* ___ U.S. ___, 109 S.Ct. 3216, 106 L.Ed.2d 566 (1989) (California statute prohibiting unfair insurance claims processing held preempted by ERISA); *In re Life Ins. Co. of N. Am.,* 857 F.2d 1190 (8th Cir.1988) (Missouri statute prohibiting vexatious refusal to pay insurance claims held preempted by ERISA); *Anschultz v. Connecticut Gen. Life Ins. Co.,* 850 F.2d 1467 (11th Cir.1988) (Florida statute providing private right of action to persons injured by

violations of state's insurance code held preempted by ERISA).

Particularly persuasive is the unanimity of the Louisiana federal district courts in holding R.S. 22:657 to be preempted in ERISA.[6] In each of these cases, the court has found R.S. 22:657 to be in conflict with the comprehensive civil enforcement provisions of ERISA. The Court of Appeal in the instant case felt the lower federal court holdings were not persuasive because each was rendered prior to this Court's ruling in *Soniat v. Travelers Ins. Co.*, 538 So.2d 210 (La.1989). However, *Soniat* deals with a statute which is clearly distinguishable from R.S. 22:657.

In *Soniat*, this Court considered whether La.R.S. 22:213(B)(7)[7] was preempted by ERISA. Specifically, we considered whether ERISA preempts the portion of § 213 which prevents the cancellation of a policy from prejudicing the rights of a policyholder concerning claims arising prior to the cancellation. In finding R.S. 22:213 to be

---

[6] *Taylor v. Blue Cross/Blue Shield of New York*, 684 F.Supp. 1352 (E.D.La.1988); *Sublett v. Premier Bancorp Self Funded Medical Plan*, 683 F.Supp. 153 (M.D.La.1988); *Rasmussen v. Metropolitan Life Ins. Co.*, 675 F.Supp. 1497 (W.D.La. 1987).

[7] At the time the events involved in *Soniat* took place, La.R.S. 22:213(B)(7) provided: "Cancellation: the insurer may cancel this policy at any time by written notice delivered to the insured, or mailed to his last address as shown by the records of the insurer, and shall refund the pro rata unearned portion of any premium paid. *Such cancellation shall be without prejudice to any claim originating prior thereto . . . " (Emphasis added).*

within the savings clause of ERISA and thus not pre-empted, we reviewed the McCarran-Ferguson factors and found they were met. More importantly, however, we noted that R.S. 22:213(B)(7) "does not conflict with the substantive provisions of ERISA and . . . does not create a conflict with ERISA's civil enforcement scheme." 538 So.2d at 215.

Additionally, a careful reading of *Soniat* reveals the statute involved in that case is more closely analogous to the mandated-benefit law held by the court in *Metropolitan Life* not to be preempted by ERISA than it is to R.S. 22:657 or the common law of bad faith involved in *Pilot Life*. For the reasons discussed below, we believe the United States Supreme Court in *Metropolitan Life* and *Pilot Life* has created a distinction between state laws which regulate the substantive terms of the insurance contract, such as the statute involved in *Soniat*, and those which merely regulate aspects of transacting the business of group insurance, such as R.S. 22:657.

In *Metropolitan Life*, the Supreme Court addressed the question of whether Massachusetts Gen. Laws Ann., ch. 175, § 47B (West Supp.1985) is preempted by ERISA. The statute requires any general health-insurance policy issued to a Massachusetts resident that provides hospital and surgical coverage, or any benefit plan that has such coverage, to provide as well a certain minimum of mental-health protection. The Court held the statute "regulates insurance" and thus is not preempted by ERISA. Of particular importance is the Court's discussion of the various types of state insurance regulation that exist, and the reason why § 47B was not the type of state regulation intended to be preempted by ERISA. The Court noted

state insurance regulations can be categorized as follows: regulation of the insurance carrier, regulation of the aspects of transacting the business of group insurance, and regulation of the content of the insurance contracts. As an example of the kinds of state laws which regulate the content of the insurance contract, the Court mentioned those requiring policies to contain grace periods and conversion privileges. The Court also construed mandated-benefit regulations, like § 47B, to fall within the regulation of the content of the insurance contract.

After categorizing § 47B as a type of law regulating the content of the insurance contract, the Court noted that ERISA "does not regulate the substantive content of welfare-benefit plans." 105 S.Ct. at 2385. The Court then found § 47B not to be preempted by ERISA, and made the following observations which illuminate the rationale both for the holding in *Metropolitan Life* and the later holding in *Pilot Life*:

> To state the obvious, § 47B regulates the terms of certain insurance contracts, and so seems to be saved from pre-emption by the saving clause as a law 'which regulates insurance.' This commonsense view of the matter, moreover, is reinforced by the language of the subsequent subsection of ERISA, the 'deemer clause[,]' which states that an employee-benefit plan shall not be deemed to be an insurance company 'for purposes of any law of any State purporting to regulate insurance companies, *insurance contracts*, banks, trust companies, or investment companies.' (emphasis added). By exempting from the saving clause laws regulating insurance contracts that apply directly to benefit plans, the deemer clause makes explicit Congress' intention to include laws that regulate

> insurance contracts within the scope of the insurance laws preserved by the saving clause.

105 S.Ct. at 2389-90. When the quoted language is considered in light of the Court's earlier categorization of the types of state insurance regulation, it is clear the Court in *Metropolitan Life* was restricting its holding to those state laws which regulate the contents of the insurance contract. In other words, the Court's holding does not address those types of state laws which regulate the carrier or which regulate aspects of transacting the business of group insurance.

The precise scope of the holding in *Metropolitan Life* is mentioned because it is important to a complete understanding of the rationale use by the Supreme Court in *Pilot Life*. In *Pilot Life*, the Mississippi law focused upon, when applied to an employee-benefit plan, did not fall within the category of laws which regulate the content of the insurance contract. Rather, the law, when applied to an employee-benefit plan, more appropriately fit within the *Metropolitan Life* Court's second category of laws regulating insurance, namely one which regulates aspects of transacting the business of insurance.[8] Consequently, the Court in *Pilot Life* had to address a law which, unlike the law in *Metropolitan Life*, governed matters also governed by ERISA. By finding the Mississippi law to be preempted because of its conflict with ERISA's civil enforcement scheme, the Court in *Pilot Life* essentially created a

---

[8] In fact, as an example of a law which regulates aspects of transacting the business of insurance, the Court in *Metropolitan Life* referred to laws regulating claims practices. 105 S.Ct. at 2383, n. 2.

distinction between state laws which regulate the content of the insurance contract, such as mandated benefit laws, and state laws which regulate aspects of transacting the business of insurance, such as remedial laws pertaining to claims handling. State laws which fall into the latter category are preempted by ERISA because ERISA itself contains a comprehensive civil enforcement scheme which regulates the practice of claims handling. State laws which fall into the former category are not preempted because ERISA itself contains no regulation of the substantive terms of insurance contracts.

With the above distinction in mind, it is clear our holding in *Soniat* does not conflict with our holding today. The statute involved in *Soniat*, by preventing the cancellation of a policy from prejudicing the rights of a policyholder concerning claims arising prior to the cancellation, regulates the substantive terms of any health insurance contract issued in Louisiana. It essentially redefines a "covered" illness for purposes of the insurance contract. Thus, the statute falls within the same category of regulations as was involved in *Metropolitan Life*. R.S. 22:657, on the other hand, has no effect on the substantive terms of the insurance contract. It merely grants a remedy for the breach of a previously defined contractual relationship. Thus, it falls within the category of regulations which regulate aspects of transacting the business of insurance, which are preempted by ERISA.

II.

Because we find La.R.S. 22:657 is preempted by ERISA, it follows that plaintiffs are not entitled to a trial

by jury. The Court of Appeal's ruling indicates the only state law claims raised by plaintiffs are those arising under R.S. 22:657. Because the R.S. 22:657 claims are preempted, plaintiffs' only remaining claims arise under ERISA. Federal law is clear that no right to a trial by jury exists under ERISA on an action to recover benefits, or to clarify or enforce rights under an employee welfare benefit plan. *Crews v. Central States, Southeast and Southwest Areas Pension Fund*, 788 F.2d 332, 338 (6th Cir.1986); *Howard v. Parisian, Inc.*, 807 F.2d 1560, 1567 (11th Cir.1987).

CONCLUSION

We hold La.R.S. 22:657, as applied to a claim under an employee welfare benefit plan subject to ERISA, is preempted by ERISA both because it fails to meet the McCarran-Ferguson criteria and because it conflicts with the civil enforcement provisions of ERISA. The Court of Appeal's denial of defendant's motion for partial summary judgment is reversed and the case is remanded to the trial court for further proceedings in accordance with our ruling.

REVERSED AND REMANDED.

CALOGERO, C.J., dissents and assigns reasons.

LEMMON, J., dissents and will assign reasons.

CALOGERO, Chief Judge, dissenting.

I dissent from the majority's conclusion that La.R.S. 22:657, providing for penalties and attorney's fees to be paid by an insurer who unjustly delays the payment of a claim, is preempted by ERISA. This statute regulates

insurance, and therefore ERISA's "saving clause" excepts the statute from preemption.

The majority relies on the United States Supreme Court's decision in *Pilot Life* in finding that R.S. 22:657 does not fall within the saving clause. In *Pilot Life*, the United States Supreme Court weighed two major considerations which guided it in *Metropolitan Life* in determining whether a state law comes under the saving clause. These were: 1) a "common sense view" of the language of the clause itself, and 2) the criteria used to interpret the term "business of insurance" for purposes of the McCarran-Ferguson Act. *Pilot Life*, 481 U.S. at 48, 107 S.Ct. at 1553, 95 L.Ed.2d at 48.

Under the common sense test, La.R.S. 22:657 clearly falls within the saving clause. In allowing for attorney's fees and penalties to be assessed against an insurer who unjustly fails to pay a claim within thirty days, the statute is directed at regulating the duties of an insurer in any health and accident contract. La.R.S. 22:657 therefore regulates the "business of insurance" and passes the common sense test. In *Pilot Life*, the Court found that the Mississippi common law of bad faith was not saved under a common sense view because the law was not directed specifically toward the insurance industry, but was firmly planted in principles of tort and contract law. The statute in question here is clearly directed toward the insurance industry and should be found to fall under the language of the saving clause.

As for the second consideration employed in *Pilot Life*, I find that two of the three McCarran-Ferguson criteria have been met. I agree with the majority that this

statute does not have the effect of spreading the policyholder's risk and that the first criterion has not been met. However, I disagree with the majority's finding that the statute is not an integral part of the insurer-insured relationship. Timely payment of a claim is the central obligation of an insurance contract and a matter of major importance in the relationship between the parties to that contract. This statute imposes a duty on the insurer to pay a claim within a certain time and establishes a penalty for breaching that obligation. The statute affects an integral part of the relationship and meets the second McCarran-Ferguson factor. As to the third factor, even the majority concedes, and I agree, that the statute is directed toward entities within the insurance industry.

No one of the McCarran-Ferguson criteria is determinative, and therefore not all three are necessary to find a statute to regulate the business of insurance. *Pireno*, 458 U.S. at 129, 102 S.Ct. at 3009, 73 L.Ed.2d at 657. Two of the three McCarran-Ferguson factors are met. I find that this, along with the fact that the statute passes the common sense test of regulating the business of insurance, establishes that La.R.S. 22:657 falls under the saving clause and is not preempted by ERISA.

It should also be noted that the primary basis for our finding in *Soniat* that La.R.S. 22:213B(7) was not preempted was the fact that it is part of the Insurance Code, whose stated purpose it to "regulate insurers and the insurance business." *Soniat*, 538 So.2d at 214. The statute in question here is also part of that body of law and should be considered to regulate insurance and fall under the saving clause.

In conclusion, while ERISA does apply to this case because it deals with an "employee benefit plan," a state law cause of action still exists because La.R.S. 22:657 is not preempted by ERISA. The plaintiff therefore should have a claim for penalties and attorney's fees and should be allowed a jury trial on these issues. I would affirm the Court of Appeal's decision.